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RHB Islamic Bank Bhd v Alam Maritim (L) Inc

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-1792–12 OF 2023
YUSRIN FAIDZ JC
3 JANUARY 2025

C *Banking — Banker and customer — Claim for amount outstanding under banking facility — Plaintiff granted Commodity Murabahah financing facility to defendant — Amounts and payment schedule under financing facility restructured via approval from Corporate Debt Restructuring Committee ('CDRC') of Bank Negara Malaysia ('BNM') — Parties entered into supplemental facility agreement* D *to give effect to restructuring — Defendant defaulted in payment — Plaintiff commenced action and applied for summary judgment — Whether defendant had applied to be admitted under CDRC — Whether admission into CDRC and supplemental facility agreement were void due to plaintiff's failure to obtain* E *sanction from Shariah Advisory Council of Bank Negara Malaysia — Whether banking facility contradicted Shariah principles — Whether charges levied on defendant excessive and beyond terms of contract — Whether plaintiff's certificate of indebtedness conclusive and unchallenged — Contracts Act 1950 — Islamic Financial Services Act 2013 s 281*

F

Civil Procedure — Summary judgment — Civil Procedure — Summary judgment — Action to recover monies loaned — Plaintiff granted Commodity Murabahah financing facility to defendant — Amounts and payment schedule under financing facility restructured via approval from Corporate Debt G *Restructuring Committee ('CDRC') of Bank Negara Malaysia ('BNM') — Defendant defaulted in payment — Plaintiff commenced action and applied for summary judgment — Whether plaintiff complied with procedural requirement of summary judgment application — Whether defendant successfully raised genuine disputes of material fact that required a trial — Rules of Court* H *2012 O 14*

The plaintiff, an Islamic financial institution, had granted the defendant with a Commodity Murabahah Term Financing-i ('CMTF-i facility') for the sum of USD2.6m, and a Commodity Murabahah Revolving Credit-i ('CMRC-i I Facility') for the sum of USD750,000. For this purpose, the parties had entered into two facility agreements. Subsequently, through the approval of Corporate Debt Restructuring Committee ('CDRC') of Bank Negara Malaysia ('BNM'), the plaintiff agreed to rearrange and/or restructure the amounts and payment schedule via a supplemental letter of offer and simultaneously, the CMRC-i

was canceled. Following the supplemental letter of offer, the parties entered into a supplemental facility agreement for the CMTF-i ('the supplemental facility agreement') to give effect to the said restructuring/reorganisation. When the defendant defaulted in the payment of the CMTF-i, the plaintiff demanded the outstanding sum from the defendant. Based on a certificate of indebtedness issued by the plaintiff, the defendant owed a total sum of USD2,347,280.65 which included the principal sum, the profit charge, *ta'widh* and other charges. The defendant argued that no such sum was due and payable because the plaintiff's claim was wrongful and against Shariah principles. The plaintiff then filed an action against the defendant in relation to the outstanding sum, followed by the present application for summary judgment ('encl 12'). The defendant on the other hand filed encl 17 for the discovery of the defendant's letter to the CDRC dated 24 May 2017, which was allowed by the court and when it had come to light that the defendant did not issue such letter, para 8 of the plaintiff's statement of claim which referred to the said letter was expunged by the court. With respect to encl 12, the main questions for the court's determination were: (a) whether the plaintiff had complied with the procedural requirement of summary judgment application; and (b) whether the defendant had successfully raised genuine disputes of material fact that required a trial. In relation to the second question, the triable issues raised by the defendant were as followed: (i) whether the defendant had applied to be admitted under CDRC vide letter dated 24 May 2017; (ii) whether the admission into CDRC and the supplemental facility agreement were void due to the plaintiff's alleged failure to obtain sanction from BNM's Shariah Advisory Council ('the SAC'); (iii) whether the banking facility contradicted Shariah principles — in this regard, the defendant argued that the banking facility contravened Shariah principles because no actual *murabahah* transaction occurred; (iv) whether the charges levied on the defendant were excessive and beyond the terms of the contract — the defendant argued that the *ta'widh* rates and other charges imposed by the plaintiff beyond 12% profit charges were without basis, exploitative, and against the Islamic principles; and (v) whether the plaintiff's certificate of indebtedness was conclusive and unchallenged — the defendant argued that bank could not impose the daily weighted average overnight rate for *mudharabah* interbank investments quoted in Malaysia's Islamic interbank money market ('IIMM-rate') or the BNM prorated IIMM rate when contractually, *ta'widh* had been fixed at 1%pa and no written notice had been given to the borrower of its increase.

Held, granting order in terms of the plaintiff's application for summary judgment in encl 12 with costs of RM7,000:

(1) Having carefully considered the facts of the case, the court opined that the plaintiff had met all the requisite conditions under O 14 of the Rules of Court 2012. The defendant entered an appearance on 22 December

2023, and the deponent of the plaintiff's affidavit in support, affirmed on 16 February 2024, had stated with conviction that there was no defence to the plaintiff's claim. As to the service of the statement of claim, the affidavit of service affirmed on 28 December 2023 showed that it was personally served on the defendant on 12 December 2023. As such, the burden then shifted to the defendant to demonstrate why judgment should not be entered (see para 23).

(2) In the court's considered view, while the plaintiff had not produced the defendant's letter of application to the CDRC, it was undisputed that the defendant had been admitted into the restructuring scheme. The efforts facilitated by the CDRC had successfully garnered consensus among the relevant creditors, thereby contributing to the stabilisation and rehabilitation of the Alam Maritim group of companies, including the defendant. With para 8 of the statement of claim having been expunged, the plaintiff bore no obligation to disclose any letter purportedly associated with the defendant's application to the CDRC. Thus, the court opined that whether the defendant itself applied to the CDRC was a distinction without substance in this context. The defendant could not now disavow the very agreement it executed and from which it derived clear benefits. Accordingly, the court found that this issue was not triable (see paras 38–39).

(3) It should be noted that SAC rulings were confined only to Shariah issues, with the presiding judge retaining the judicial power to decide on the borrower's liability based on evidence and applicable laws. In the present case, regarding the validity of entering into a restructuring agreement, the court was satisfied that the method of variation via a supplementary agreement with the principal objective to grant more time was contractually sound. Further, while there was no specific SAC ruling requiring a sanction before admission to the CDRC or the execution of a supplementary agreement to extend the repayment period, the resolution passed at the 32nd meeting of the SAC clarified that such extensions did not necessitate a new contract. This resolution strongly supported the plaintiff's position that the restructuring of the financing facilities — primarily aimed at providing a moratorium period — complied with Shariah principles. A new contract was required only if it resulted in an increase in the original sale price. Even then, there was no requirement for a sanction in relation to the new contract. Accordingly, the defendant's allegation of a failure to obtain sanction was baseless and did not raise a triable issue (see paras 42–45).

(4) Under s 281 of the Islamic Financial Services Act 2013, non-compliance with Shariah principles alone did not invalidate an agreement between the parties. Therefore, an agreement that contravened SAC rulings was not necessarily void unless it also violated provisions of the Contracts Act

1950. The main objective of commodity murabahah was to raise cash, which was eventually disbursed to the borrower. In the present case, since the cash was indeed raised and made available to the defendant, the method of raising such cash — even if it allegedly did not fully comply with Shariah principles — did not undermine the validity of the contract. Further, the court in the present case was bound by the decisions of the Court of Appeal in *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69, *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686 (CA), and *Maybank Islamic Berhad v Golden Base Construction Sdn Bhd & 2 Ors* (W-02(IM)(MUA)-1035–06 of 2019) (unreported), in that non-compliance of Shariah principles or SAC rulings alone would not amount to a triable issue (see paras 59–61).

(5) The agreements were unequivocal with respect to the charges to be imposed. Clause 11.4 of the facility agreements authorised the plaintiff to debit the defendant's account with any notice in respect of any cost, expenses, charges and payment due. Whilst cl 18.26 of the facility agreements clearly entitled the plaintiff to *ta'widh* at the rate of 1% on overdue amounts during the tenure of the facilities, and a further *ta'widh* not exceeding the IIMM-rate on the outstanding financing amount after the expiry of the financing tenure. The court found that the plaintiff was well within its rights to impose the charges as per the agreement entered into by the parties. In any event, the court opined that the defendant had ample opportunity to review the terms of the agreements or to seek independent legal or Shariah advice, yet chose to raise no objections until the initiation of the present suit. It was wholly untenable for the defendant, having fully utilised the financing, derived substantial benefits therefrom, and further enjoyed the restructuring arrangement facilitated by the CDRC, to now challenge the validity of the very agreements that granted them these advantages (see paras 66–70).

(6) The court found that there was conclusive evidence clause in the facility agreements. Conclusive evidence clauses operated to establish that a determination of the amount owed by a debtor was, for all intents and purposes, final and binding as to the sum payable. In the present case, at all material times, the defendant did not raise any objections to the quantification of amount due. Based on the affidavit evidence presented, the defendant had failed to identify any glaring, plain, or obvious error in the certificate. In this regard, from January 2021–December 2023, the published IIMM-rates ranged between 1.68% and 3.07%. While the *ta'widh* imposed post-maturity, compared to the 1% rate applied pre-maturity, may appear 'excessive,' it was important to note that there was no requirement for the plaintiff to notify the defendant of these variations. The certificate of indebtedness, reflecting IIMM rates ranging from 1.72% to 3.05%, remained unchallenged and was deemed

A conclusive. Accordingly, the court found that this issue did not give rise to a triable matter (see paras 73–74, 82–83 & 86).

[Bahasa Malaysia summary

B Plaintif, sebuah institusi kewangan Islam, telah memberikan defendan Pembiayaan Komoditi Murabahah Berjangka-i ('Kemudahan CMTF-i') untuk jumlah USD2.6 juta, dan Pembiayaan Komoditi Murabahah Kredit Pusingan-i ('Kemudahan CMRC-i') untuk jumlah USD750,000. Untuk tujuan ini, pihak-pihak telah memeterai dua perjanjian kemudahan. Selepas itu, melalui kelulusan Jawatankuasa Penstrukturan Semula Hutang Korporat C ('CDRC') Bank Negara Malaysia ('BNM'), plaintif bersetuju untuk menyusun semula dan/atau menstrukturkan semula amaun dan jadual pembayaran melalui surat tawaran tambahan dan pada masa yang sama, CMRC-i telah dibatalkan. Berikutan surat tawaran tambahan tersebut, pihak-pihak telah menandatangani perjanjian kemudahan tambahan untuk CMTF-i D ('perjanjian kemudahan tambahan tersebut') untuk memberi kesan kepada penstrukturan/penyusunan semula tersebut. Apabila defendan ingkar dalam pembayaran CMTF-i, plaintif telah menuntut jumlah tertunggak daripada defendan. Berdasarkan sijil keberhutangan yang dikeluarkan oleh plaintif, defendan berhutang sejumlah USD2,347,280.65 termasuk jumlah prinsipal, E caj keuntungan, *ta'widh* dan caj-caj lain. Defendan berhujah bahawa tiada jumlah yang terhutang dan perlu dibayar kerana tuntutan plaintif adalah salah dan bertentangan dengan prinsip Syariah. Plaintif kemudiannya memfailkan tindakan terhadap defendan berhubung dengan jumlah tertunggak tersebut, diikuti dengan permohonan semasa untuk penghakiman terus ('lampiran 12'). F Defendan sebaliknya memfailkan lampiran 17 untuk memohon penzahiran surat defendan kepada CDRC bertarikh 24 Mei 2017, yang mana permohonan tersebut dibenarkan oleh mahkamah dan apabila diketahui bahawa defendan tidak mengeluarkan surat sedemikian, perenggan 8 pernyataan tuntutan plaintif yang merujuk kepada surat tersebut telah G dipadamkan oleh mahkamah. Berkenaan dengan lampiran 12, persoalan-persoalan utama untuk penentuan mahkamah ialah: (a) sama ada plaintif telah mematuhi keperluan prosedur permohonan penghakiman terus; dan (b) sama ada defendan telah berjaya membangkitkan pertikaian tulen mengenai fakta material yang memerlukan perbicaraan. Berhubung dengan H persoalan kedua, isu-isu yang boleh dibicarakan yang dibangkitkan oleh defendan adalah seperti berikut: (i) sama ada defendan telah memohon untuk diterima masuk di bawah CDRC melalui surat bertarikh 24 Mei 2017; (ii) sama ada kemasukan ke dalam CDRC dan perjanjian kemudahan tambahan tersebut adalah terbatal disebabkan oleh dakwaan kegagalan plaintif I untuk mendapatkan sanksi daripada Majlis Penasihat Syariah BNM ('MPS'); (iii) sama ada kemudahan perbankan tersebut bercanggah dengan prinsip Syariah — dalam hal ini, defendan berhujah bahawa kemudahan perbankan tersebut melanggar prinsip Syariah kerana tiada transaksi *murabahah* sebenar yang berlaku; (iv) sama ada caj-caj yang dikenakan ke atas defendan adalah

berlebihan dan melebihi terma kontrak — defendan berhujah bahawa kadar *ta'widh* dan caj-caj lain yang dikenakan oleh plaintif melebihi 12% caj keuntungan adalah tanpa asas, eksploitatif, dan bertentangan dengan prinsip Islam; dan (v) sama ada sijil keberhutangan plaintif adalah muktamad dan tidak dicabar — defendan berhujah bahawa bank tidak boleh mengenakan kadar semalaman purata wajaran harian bagi pelaburan antara bank Mudharabah yang disebut dalam pasaran wang antara bank Islam Malaysia ('kadar IIMM') atau kadar IIMM prorata BNM apabila di dalam kontrak, *ta'widh* telah ditetapkan pada kadar 1% setahun dan tiada notis bertulis diberikan kepada peminjam tentang kenaikannya.

Diputuskan, memberikan perintah seperti dipohon di dalam permohonan plaintiff untuk penghakiman terus di dalam lampiran 12 dengan kos sebanyak RM7,000:

(1) Setelah mempertimbangkan dengan teliti fakta kes, mahkamah berpendapat bahawa plaintif telah memenuhi semua syarat yang diperlukan di bawah A 14 Kaedah-Kaedah Mahkamah 2012. Defendan telah memasukkan kehadiran pada 22 Disember 2023, dan deponen bagi afidavit sokongan plaintif yang disahkan pada 16 Februari 2012, telah menyatakan dengan tegas bahawa tidak terdapat pembelaan bagi tuntutan plaintif. Mengenai penyampaian pernyataan tuntutan, afidavit penyampaian yang disahkan pada 28 Disember 2023 menunjukkan bahawa ia telah disampaikan secara peribadi kepada defendan pada 12 Disember 2023. Oleh itu, beban kemudiannya beralih kepada defendan untuk menunjukkan mengapa penghakiman tidak perlu dimasukkan (lihat perenggan 23).

(2) Pada pandangan mahkamah, walaupun plaintif tidak mengemukakan surat permohonan defendan kepada CDRC, adalah tidak dipertikaikan bahawa defendan telah diterima masuk ke dalam skim penstrukturan semula tersebut. Usaha yang dipermudahkan oleh CDRC tersebut telah berjaya memperoleh konsensus di kalangan pemiutang-pemiutang yang berkaitan, sekali gus menyumbang kepada penstabilan dan pemulihan kumpulan sykt Alam Maritim, termasuk defendan. Dengan perenggan 8 pernyataan tuntutan telah dipadamkan, plaintif tidak mempunyai tanggungjawab untuk mendedahkan apa-apa surat yang dikatakan berkaitan dengan permohonan defendan kepada CDRC. Oleh itu, mahkamah berpendapat sama ada defendan sendiri memohon kepada CDRC atau tidak adalah satu perbandingan tanpa asas dalam konteks ini. Defendan kini tidak boleh menafikan perjanjian yang telah dilaksanakannya yang daripadanya ia memperoleh manfaat yang jelas. Sehubungan itu, mahkamah mendapati bahawa isu ini tidak boleh dibicarakan (lihat perenggan 38–39).

(3) Perlu diingatkan bahawa ketetapan MPS hanya terhad kepada isu

Syariah, dengan hakim yang bersidang mengekalkan kuasa kehakiman untuk memutuskan liabiliti peminjam berdasarkan keterangan dan undang-undang yang terpakai. Dalam kes ini, mengenai keabsahan membuat perjanjian penstrukturan semula, mahkamah berpuas hati bahawa kaedah variasi melalui perjanjian tambahan dengan objektif utama untuk memberikan lebih banyak masa adalah sah dari segi kontrak. Selanjutnya, walaupun tiada ketetapan MPS khusus yang memerlukan sanksi sebelum kemasukan di bawah CDRC atau pelaksanaan perjanjian tambahan tersebut untuk melanjutkan tempoh pembayaran balik, resolusi yang diluluskan pada mesyuarat ke-32 MPS menjelaskan bahawa lanjutan tersebut tidak memerlukan kontrak baharu. Resolusi ini sangat menyokong pendirian plaintif bahawa penstrukturan semula kemudahan pembiayaan — terutamanya yang bertujuan untuk menyediakan tempoh moratorium — adalah mematuhi prinsip Syariah. Kontrak baharu diperlukan hanya jika ia mengakibatkan kenaikan harga jualan asal. Walaupun begitu, tiada keperluan untuk sanksi berhubung dengan kontrak baharu tersebut. Sehubungan itu, dakwaan defendan tentang kegagalan untuk mendapatkan sanksi adalah tidak berasas dan tidak menimbulkan isu yang boleh dibicarakan (lihat perenggan 42–45).

(4) Di bawah s 281 Akta Perkhidmatan Kewangan Islam 2013, ketidakpatuhan terhadap prinsip Syariah sahaja tidak membatalkan perjanjian antara pihak-pihak. Oleh itu, perjanjian yang melanggar ketetapan MPS tidak semestinya terbatal melainkan ia juga melanggar peruntukan Akta Kontrak 1950. Objektif utama komoditi murabahah adalah untuk memperoleh wang tunai, yang akhirnya diagihkan kepada peminjam. Dalam kes semasa, memandangkan wang tunai sememangnya diperoleh dan disalurkan kepada defendan, kaedah untuk mendapatkan wang tunai tersebut — walaupun ia didakwa tidak mematuhi sepenuhnya prinsip Syariah — tidak menjejaskan keabsahan kontrak. Selanjutnya, mahkamah dalam kes semasa terikat dengan keputusan Mahkamah Rayuan di dalam kes-kes *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69, *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686 (MR), dan *Maybank Islamic Berhad v Golden Base Construction Sdn Bhd & 2 Ors* (W-02(IM)(MUA)-1035–06 Tahun 2019) (tidak dilaporkan), bahawa ketidakpatuhan prinsip Syariah atau ketetapan MPS sahaja tidak akan berjumlah kepada isu yang boleh dibicarakan (lihat perenggan 59–61).

(5) Perjanjian-perjanjian tersebut menyatakan dengan tidak berbelah bahagi berkenaan dengan caj-caj yang akan dikenakan. Klausa 11.4 perjanjian kemudahan tersebut membenarkan plaintif mendebit akaun defendan dengan apa-apa notis berkenaan dengan apa-apa kos, perbelanjaan, caj-caj dan bayaran yang perlu dibayar. Sementara klausa 18.26

perjanjian kemudahan tersebut jelas melayakkan plaintif untuk *ta'widh* pada kadar 1% ke atas jumlah tertunggak semasa tempoh kemudahan, dan *ta'widh* selanjutnya tidak melebihi kadar IIMM ke atas jumlah pembiayaan tertunggak selepas tamat tempoh pembiayaan. Mahkamah mendapati bahawa plaintif berhak untuk mengenakan caj-caj tersebut mengikut perjanjian yang dimeterai oleh pihak-pihak. Walau apa pun, mahkamah berpendapat bahawa defendan mempunyai peluang yang mencukupi untuk menyemak terma perjanjian atau mendapatkan nasihat undang-undang atau Syariah yang bebas, namun memilih untuk tidak mengemukakan bantahan sehingga permulaan saman semasa. Setelah menggunakan pembiayaan tersebut sepenuhnya, memperoleh manfaat yang besar daripadanya, dan seterusnya menikmati pengaturan penstrukturan semula yang dipermudahkan oleh CDRC, pencabaran defendan terhadap keabsahan perjanjian-perjanjian yang memberikan mereka kelebihan-kelebihan ini adalah tidak dapat dipertahankan sepenuhnya (lihat perenggan 66–70).

(6) Mahkamah mendapati terdapat klausa keterangan konklusif dalam perjanjian-perjanjian kemudahan tersebut. Klausa keterangan konklusif beroperasi untuk menetapkan bahawa penentuan amaun yang terhutang oleh penghutang adalah, bagi semua maksud dan tujuan, adalah muktamad dan mengikat mengenai jumlah yang perlu dibayar. Dalam kes semasa, pada setiap masa yang material, defendan tidak membangkitkan apa-apa bantahan terhadap pengiraan amaun yang perlu dibayar. Berdasarkan keterangan afidavit yang dikemukakan, defendan telah gagal untuk mengenal pasti apa-apa kesilapan yang terang-terangan, jelas atau nyata dalam sijil tersebut. Dalam hal ini, dari Januari 2021–Disember 2023, kadar IIMM yang diterbitkan adalah antara 1.68% dan 3.07%. Walaupun *ta'widh* yang dikenakan selepas tempoh matang, berbanding dengan kadar 1% yang diguna pakai sebelum tempoh matang, mungkin kelihatan 'berlebihan', adalah penting untuk diambil perhatian bahawa tidak ada keperluan untuk plaintif memberitahu defendan tentang perubahan ini. Sijil keberhutangan, yang menggambarkan kadar IIMM antara 1.72% hingga 3.05%, kekal tidak dicabar dan dianggap muktamad. Sehubungan itu, mahkamah mendapati bahawa isu ini tidak menimbulkan perkara yang boleh dibicarakan (lihat perenggan 73–74, 82–83 & 86).]

Cases referred to

Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264, CA (refd)

Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris [1973] 2 Lloyd's Rep 437, CA (refd)

Bank Kerjasama Rakyat Berhad (M) v Koperasi Serbaguna Iman Malaysia

Berhad [2020] MLJU 438; [2020] MLRHU 331, HC (refd)
Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors [2017] 2 MLJ 686, CA (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Citranet Sdn Bhd v Kuwait Finance House (M) Bhd [2016] 12 MLJ 397, HC (refd)
Dobbs v National Bank of Australasia Ltd [1953] 53 CLR 643, HC (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)
Flowgroup plc (in liquidation) v Co-Operative Energy Ltd [2021] EWHC 344 (Comm), QBD (refd)
HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors [2005] 6 MLJ 625, HC (refd)
JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183, SC (refd)
Maybank Islamic Berhad v Golden Base Construction Sdn Bhd & 2 Ors (W-02(IM)(MUA)-1035–06 of 2019) (unreported), CA (refd)
Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69, CA (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)
Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and another appeal [2021] 3 MLJ 408; [2021] 3 CLJ 34, CA (refd)
Public Bank Berhad v Fu Poh Trading Sdn Bhd & Others [2004] MLJU 133, HC (refd)
Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd [2014] 2 SLR 1342, HC (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206, FC (refd)

Legislation referred to

Contracts Act 1950 ss 24, 30
Civil Procedure Code 1907
Federal Constitution Ninth Schedule, List I, item 7(j)
Islamic Financial Services Act 2013 ss 28, 28(5), 135, 281
Rules of Court 2012 O 14, O 14 rr 1, 3

Noraini bt Roslie (Ariff & Co) for the plaintiff.
Ravindranath Woodhull (Azhar Yong & Co) for the defendant.

Yusrin Faidz JC:

INTRODUCTION

[1] This case arises from a financing arrangement in which the plaintiff, an Islamic financial institution, extended facilities to the defendant. The plaintiff asserts that the defendant has defaulted on its repayment obligations. The plaintiff therefore seeks summary judgment, contending that this is a straightforward matter devoid of any triable issues. Conversely, the defendant argues that there are substantive issues that necessitate further examination at trial. This judgment seeks to address whether the issues raised by the defendant constitute genuine triable matters, or whether the plaintiff is entitled to summary judgment as claimed.

Background facts

[2] The defendant was a customer of the plaintiff bank, having applied for financing in connection with the provision of transportation and engineering services to the oil and gas industry. Based on an offer letter dated 21 July 2016 ('offer letter'), the plaintiff granted the defendant with a commodity *murabahah* term financing-i ('CMTF-i facility') for the sum of USD2,600,000, and a commodity *murabahah* revolving credit-i ('CMRC-i facility') for the sum of USD750,000 (collectively referred to as the 'banking facility').

[3] Pursuant to the said offer letter, the following agreements were entered into between the plaintiff and the defendant:

(a) a commodity murabahah agreement (for the CMTF-i facility) executed on 29 November 2016, with a principal limit of USD2,600,000, to partially finance the acquisition of a vessel categorised as other cargo/supply ship/offshore tug, identified as 'WBI Trinity' (the 'said vessel'), bearing Registration No 40266-09-B and IMO No 9545766, and registered under the Panama Maritime Authority, flying the Panama flag; and

(b) a commodity *murabahah* agreement (for the CMRC-i facility) executed on 29 November 2016, amounting to USD750,000, designated for working capital requirements and/or drydocking of the said vessel (see exh LCH1, of encl 14).

(referred together as 'the facility agreements').

[4] The commitment of the parties to the banking facility was further evidenced by the concomitant execution of the following documents:

A (a) specific debenture dated 29 November 2016 between the plaintiff and the defendant;

(b) deed of assignment of contract proceeds dated 29 November 2016 between the plaintiff and the defendant;

B (c) third party deed of assignment of contract proceeds dated 29 November 2016 between the plaintiff and Workboat International DMCCO (Dubai Company No 80004);

(d) deed of assignment and charge over designated collection account dated C 29 November 2014 between the plaintiff and the defendant;

(e) corporate guarantee dated 29 November 2019 between the plaintiff and Alam Maritim Resources Bhd (Company No 700849-K);

(f) deed of covenants accompanying first mortgage (WBI Trinity) from the D defendant to the plaintiff;

(g) letter of confirmation and undertaking dated 29 November 2016 from the defendant to the plaintiff;

(h) irrevocable letter of undertaking dated 29 November 2016 from the E corporate guarantor to the plaintiff; and

(i) letter of undertaking (negative pledge) dated 29 November 2016 from the defendant to the plaintiff.

F (See exh LCH2, of encl 14.)

[5] The plaintiff has accordingly disbursed the said banking facility to the defendant, and the defendant has utilised the same.

G **[6]** On 17 May 2018, through the approval of corporate debt restructuring committee ('CDRC') of Bank Negara Malaysia, the plaintiff agreed to rearrange and/or restructure the amounts and payment schedule through a supplemental letter of offer dated 17 May 2018 ('supplemental letter of offer') (exh LCH3 at PDF pp 475–480, encl 14).

H

[7] Through the supplemental letter of offer, in addition to the restructuring and reorganisation of the said banking facility it was also stated that the CMRC-i facility was canceled and no longer available.

I **[8]** Following the supplemental letter of offer, the plaintiff and the defendant executed a supplemental facility agreement for the CMTF-i on 30 August 2018 ('supplemental facility agreement') to give effect to the said restructuring/reorganisation (exh LCH3 at pdf pp 481–508, encl 14).

[9] The banking facilities reached its maturity date on 1 March 2022; wherein in breach of the terms and conditions of the facility agreements read together with the supplemental facility agreement, the total outstanding and/or owed amount to the plaintiff under the banking facility, or any part thereof, remains unpaid by the defendant.

[10] The plaintiff vide letter dated 4 September 2023 issued a letter of demand to the defendant in order to get the defendant to pay the outstanding amount due and/or owed to the plaintiff under the said banking facilities which stood at USD2,334,954.89 as at 4 September 2023 (see exh LCH4 at PDF pp 510–511, encl 14).

[11] On 6 October 2023, the plaintiff vide their solicitors Messrs Ariff & Co issued a letter of demand to the defendant's corporate guarantor, Alam Maritim Resources Bhd (see exh LCH4 at PDF pp 512–513, encl 14).

[12] The defendant did not deny receiving the said demand letters. Nevertheless, they argue that no such sum is due and payable. This is based on the fact that such claim is wrongful and against Shariah principles (see para 18 of defendant's defence in encl 11).

[13] Based on a certificate of indebtedness issued by the plaintiff (see exh LCH4 at PDF p 515, encl 14), the total outstanding and/or owed amount to the plaintiff by the defendant under the banking facility as at 6 November 2023, is as follows:

Principal	USD	1,947,074.17
Profit Charge	USD	275,762.32
TOTAL	USD	2,222,836.49
(+) Ta'widh	USD	120,602.02
(+) Other charges	USD	3,842.14
Overdue Sum	USD	2,347,280.65

The plaintiff also claims for compensation ('ta'widh') at the current overnight daily rate of the Islamic Interbank Money Market ('IIMM-rate') on the sum of USD2,222,836.49 from 7 November 2023 till realisation.

[14] On 7 December 2023, the plaintiff initiated proceedings against the defendant by filing a writ and statement of claim. The defendant filed defence on 2 February 2024. Subsequently, two interlocutory applications were filed:

(a) the plaintiff's application to obtain summary judgment (encl 12) dated 13 February 2024; and

(b) the defendant's application for the discovery dated 6 March 2024 (encl 17) in order to discover 'the defendant's letter to Corporate Debt

Restructuring Committee, Bank Negara Malaysia ('CDRC') dated 24 May 2017'.

[15] On 8 August 2024, I granted the defendant's application for discovery in encl 17, subject to an unless order stipulating that para 8 of the statement of claim would be expunged should the plaintiff fail to produce a copy of the defendant's application to the CDRC dated 24 May 2017. However, it has come to light that the defendant did not issue such letter to CDRC. Therefore, such production or disclosure is impossible. Consequently, on 9 September 2024, para 8 of the statement of claim was expunged. For ease of reference, the contents of para 8, which has been duly expunged, are as follows:

> 8. Pada 24.5.2017, Defendan telah membuat suatu permohonan kepada Corporate Debt Restructuring Committee, Bank Negara Malaysia (CDRC) bagi pengstrukturan semula bayaran yang tertunggak dan/atau terhutang kepada Plaintif.

[16] Regarding the application for summary judgment in encl 12, on 9 September 2024, I allowed the plaintiff to enter final judgment as prayed, with costs awarded in the sum of RM7,000.

[17] Aggrieved by the entry of final judgment, the defendant, on 13 September 2024, filed a notice of appeal challenging my decision in encl 12. This, therefore, is my judgment.

ISSUES

[18] The application addresses the following issues:

(a) whether the plaintiff has complied with the procedural requirement of summary judgment application ('procedural requirement'); and

(b) whether the defendant has successfully raised genuine disputes of material fact that require a trial. ('defendant showing cause').

PROCEDURAL REQUIREMENT

[19] This first issue for court's consideration is the compliance with the pre-conditions of summary judgment. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (FC), the Federal Court held that:

> For the purpose of an application under O 14 the preliminary requirements are:
>
> (a) the defendant must have entered an appearance;
>
> (b) the statement of claim must have been served on the defendant; and
>
> (c) the affidavit in support of the application must comply with the

requirements of r 2 of the O 14.

... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...

[20] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC) held that:

[5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O 14 application. With respect, that cannot be the correct proposition of law. In an application under O 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprise & Ors* [1990] 2 MLJ 36). *Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite*. (Emphasis added.)

[21] This requirement to satisfy the preconditions can be seen in O 14 r 1 of the Rules of Court 2012 ('the Rules') which read as follows:

(1) Where in an action to which this rule applies a *statement of claim has been served on a defendant* and that *defendant has entered an appearance* in the action, *the plaintiff may*, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, *apply to the court for judgment against that defendant*.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes —

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud.

(3) This order shall not apply to an action to which O 81 applies. (Emphasis added.)

[22] The underlying principle of summary judgment, which came to our shores based on the Straits Settlement's Civil Procedure Code 1907, is to expedite litigation by allowing cases to be resolved without a full trial when there are no genuine disputes of material fact. While summary judgment can significantly reduce time and costs, its improper application risks denying a party their constitutional right to due process and a fair trial. To safeguard against potential prejudice, the Rules mandates strict adherence to notice

requirements, ensuring the opposing party is afforded ample opportunity to respond. Hashim Yeop Sani SCJ in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC) at p 183 state as follows:

> (4) The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to the judgment. Order 14 is not intended to shut out the defendant. The jurisdiction should only be exercised in very clear cases.

[23] Having carefully considered the facts of the case, I am of the view that the plaintiff has met all the requisite conditions under O 14 of the Rules. The defendant entered an appearance on 22 December 2023, and the deponent of the plaintiff's affidavit in support, affirmed on 16 February 2024, has stated with conviction that there is no defence to the plaintiff's claim. As to the service of the statement of claim, the affidavit of service affirmed on 28 December 2023 showed that it was personally served on the defendant on 12 December 2023. As such, the burden now shifts to the defendant to demonstrate why judgment should not be entered.

THE DEFENDANT SHOWING CAUSE

[24] Upon shifting of this burden, O 14 r 3 of the Rules requires the defendant satisfy the following:

> (a) unless on the hearing of an application under r 1 either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that *there is an issue or question in dispute which ought to be tried* or that *there ought for some other reason to be a trial* of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed; and
>
> (b) the court may by order, and subject to such conditions, if any, as may be just, stay the execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

[25] The burden which is shifted to the defendant is a tactical one. This is succinctly described in the Singapore High Court case of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 (HC) at paras [45] to [47], wherein Vinodh Coomaraswamy J held as follows:

> [45] I should point out, however, that *the burden which shifts to the defendant upon a prima facie case being shown is the burden on the application or a tactical burden, not*

the legal or even an evidential burden of proof. It would be anomalous for a defendant to bear the legal burden of proof on a summary judgment application when at trial, that burden explicitly rests on the plaintiff. And *the fact that it is for the plaintiff first to show a prima facie case with knowledge of and in light of the defences raised makes clear that no evidential burden rests on the plaintiff. It is no part of the policy underlying summary judgment to reverse a plaintiff's burden of proof*.

[46] The policy underlying summary judgment is twofold and comprises a private and a public element. First, summary judgment enables a plaintiff with a strong claim to secure a judgment in a period of time and at an expense which is proportionate to the dispute. Second, summary judgment proceedings enables the court to conserve scarce public resources where there is no reasonable or fair probability that deploying those resources in a full trial would make a difference to the just determination of the dispute.

[47] Thus, *although it is useful shorthand to speak in terms of the burden of proof shifting to the defendant, the fact remains that the court will grant summary judgment if the plaintiff shows after all the evidence is in that the there is no fair or reasonable probability that the defendant has a real or bona fide defence and (only if the defendant raises this point) that there is no other reason why there ought to be a trial*. (Emphasis added.)

[26] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC), the Federal Court held that where an assertion, denial or dispute is equivocal, or lacking precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then such assertion or denial will be rejected, thereby rendering the issue not triable. In other words, leave to defend will not be granted based upon 'mere assertions' by defendant; instead, the court will look at the whole situation critically to examine whether the defence is credible.

[27] In the Privy Council case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (PC), at p 217, Lord Diplock explained it as thus:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as 'he may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[28] It is trite that the affidavit in opposition to the summary judgment must condescend upon particulars and directly address the claimant's claims and

supporting affidavit. In short, it should clearly outline what the defendant's defence is as well as the factual basis for it. The affidavit must contain sufficient information to demonstrate a genuine dispute requiring a trial. A general denial of the plaintiff's claims will not suffice.

[29] In light of the foregoing, we shall now proceed to consider the issues advanced by the defendant in its opposition to the plaintiff's application for summary judgment.

Whether the defendant had applied to be admitted under CDRC vide letter dated 24 May 2017

[30] The defendant's learned counsel, Ravindranath Woodhull, contends that as para 8 of the plaintiff's statement of claim has been expunged based on the unless order in encl 17, the plaintiff is not entitled to improve their case by introducing facts to explain such defect of pleadings by way of encl 21. In essence the defendant argues that the plaintiff's non-disclosure of the defendant's letter to CDRC dated 24 May 2017 amounts to non-disclosure of material fact and is against Islamic principles.

[31] Relying on the Federal Court case of *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 (FC), learned counsel for the defendant argues that any defect or omission in the statement of claim cannot be made good by affidavit evidence.

[32] Conversely, the plaintiff's learned counsel, Noraini bt Roslie, contends that while the application to the CDRC was not directly made by the defendant, it was submitted by the defendant's group of companies. Counsel further argues that the Bursa announcement exhibited in encl 21, which confirms the admission of the defendant's group to the CDRC, is a matter of public record and serves to clarify the sequence of events.

[33] In any case, learned counsel for the plaintiff submits that the origin of the application — whether by the defendant itself or its related entities — is immaterial. What is pivotal is that the defendant ultimately came under the purview of the CDRC, executed the supplemental facility agreement, and derived tangible benefits from the restructuring facilitated thereby.

[34] I am of the considered view that encl 21 is not an affidavit pertaining to the summary judgment application. Rather, it was filed in response to the defendant's application for discovery in encl 17, clarifying that no letter was issued by the defendant to the CDRC. Instead, the matter arose from a Bursa announcement made by the defendant's Corporate Guarantor, Alam Maritim Resources Bhd, which publicly disclosed that the CDRC, by its letter dated

24 May 2017, had approved the group of companies' application for assistance to mediate between the affected companies and their respective financiers. Accordingly, this court has proceeded with encl 12 without reference to the contents of encl 21 or reliance on any allegations regarding the defendant's purported letter of application dated 24 May 2017, as such allegations were predicated on the now-expunged para 8 of the statement of claim.

[35] It appears to this court that the defendant's solicitors have sought to capitalise on a scrivener's error in the now-expunged para 8 of the statement of claim, an error rooted in Recital D of the supplemental facility agreement. Recital D states as follows:

> (D) The Customer had on 24 May 2017 applied for admission into the Corporate Debt Restructuring Committee of Bank Negara Malaysia (hereinafter referred to as the 'CDRC') in order to restructure its outstanding payment of the Secured Amount to the Bank.

[36] While it is correct that the application for admission into the CDRC did not originate from the defendant, the eventual restructuring of the banking facilities, formalised through the supplemental facility agreement, was undeniably the result of the defendant's admission into the CDRC. This restructuring was explicitly designed to address the defendant's financial difficulties, and the defendant not only executed but also benefited from the terms of the said agreement.

[37] As per Schedule 6 of the supplemental facility agreement, such restructuring is designed, with the assistance of CDRC, to address the restructuring needs of the following entities under the defendant's 'Alam Maritim' group of companies to restructure their respective facilities with the respective creditors/beneficiaries:

SCHEDULE 6

List of the Beneficiaries of the Group Companies

	(1)	(2)
No.	Beneficiary(ies)	Group Companies
1.	AmBank (M) Berhad (Company No 8515-D)	Alam Swiber DLB 1 (L) Inc (Labuan Company No LL07248)
2.	Overseas-Chinese Banking Corporation Limited, Labuan (Licensed Labuan Bank No 940026C)	MDSV 1 (L) Inc (Labuan Company No LL11430)
3.	OCBC Al-Amin Bank Berhad (Company No 818444-T)	TH-Alam Holdings (L) Inc (Labuan Company No LL07417)

4.	Maybank Islamic Berhad (Company No 787435-M)	TH-Alam Holdings (L) Inc (Labuan Company No LL07417) Alam Radiance (L) Inc (Labuan Company No LL07089)
5.	Malayan Banking Berhad (Company No 3813-K)('MBB')	Alam Hidro (M) Sdn Bhd (Company No 476712-U) Alam Maritim (M) Sdn Bhd (Company No 394243-P)
6.	HSBC Bank Malaysia Berhad (Company No 127776-V)	Alam Maritim (M) Sdn Bhd (Company No 394243-P)
7.	CIMB Bank Berhad (Company No 13491-P	Alam Maritim (M) Sdn Bhd (Company No 394243-P)
8.	Bank Muamalat Malaysia Berhad (Company No 6175-W)	Alam Maritim (M) Sdn Bhd (Company No 394243-P)
9.	RHB Islamic Bank Berhad (Company No 680329-V)	Alam Maritim (L) Inc (Labuan Company No LL04288)
10.	Maybank International Labuan Branch (License No 130113D), a branch of Malayan Banking Berhad (Company No. 3813-K)	Alam Synergy I (L) Inc (Labuan Company No LL05509) Alam Synergy II (L) Inc (Labuan Company No LL05510) Alam Synergy III (L) Inc (Labuan Company No LL05511)
11.	GMV-Alam Sdn Bhd (Company No 531008-X)	Alam Synergy I (L) Inc (Labuan Company No LL05509) Alam Synergy II (L) Inc (Labuan Company No LL05510) Alam Synergy III (L) Inc (Labuan Company No LL05511)

(See PDF pp 499–500 of exh LCH3, of encl 14.)

[38] The CDRC serves as a vital platform, enabling distressed companies to engage with their creditors in a structured and collaborative manner, with the overarching aim of achieving sustainable resolutions to financial difficulties. In my considered view, while the plaintiff has not produced the defendant's letter of application to the CDRC, it is undisputed that the defendant has been admitted into the restructuring scheme. The efforts facilitated by the CDRC have successfully garnered consensus among the relevant creditors, thereby contributing to the stabilisation and rehabilitation of the Alam Maritim group of companies, including the defendant.

[39] With para 8 of the statement of claim having been expunged, the plaintiff bears no obligation to disclose any letter purportedly associated with the defendant's application to the CDRC. Thus, I am of the view that whether the defendant itself applied to the CDRC is a distinction without substance in

this context. The defendant cannot now disavow the very agreement it executed and from which it derived clear benefits. Accordingly, I find that this issue is not triable.

Whether the admission into CDRC and the supplemental facility agreement are void due to the plaintiff's alleged failure to obtain sanction from Bank Negara Malaysia's Shariah Advisory Council

[40] Learned counsel for the defendant contends, as outlined in para 7 of the defence (encl 11) and para 7 of the affidavit in opposition (encl 15), that both the reference to the CDRC and the execution of the supplemental facility agreement require the sanction and/or approval of the Bank Negara Malaysia's Shariah Advisory Council ('SAC').

[41] Conversely, learned counsel for the plaintiff argues that no such sanction is necessary to facilitate the admission of any borrower company into the CDRC or the subsequent execution of a supplemental facility agreement, which merely implements the restructuring approved by the CDRC.

[42] At the outset, it should be noted that SAC rulings are confined only to Shariah issues, with the presiding judge retaining the judicial power to decide on the borrower's liability based on evidence and applicable laws. The relevant majority judgment by Mohd Zawawi Salleh FCJ regarding the effect of the SAC's rulings as per the case of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561 (FC) is reproduced herein:

> (1) The 'ruling' that was made binding by s 57 of the 2009 Act was the 'ruling' as defined in s 56(2) of the 2009 Act which was not for a 'determination' of dispute between the parties but for the 'ascertainment' of the applicable Islamic law 'for the purposes of the Islamic financial business'. Secondly, the legislature had deliberately, in consonant with item 4(k) of the Federal List in the Ninth Schedule to the FC, employed the words 'to ascertain' and not 'to determine'. Hence, the ruling under s 57 of the 2009 Act did not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. It did not 'determine' the liability of the borrower under the Islamic facility. *The determination of a borrower's liability under any banking facility was decided by the presiding judge and not the SAC* (*Mohd Alias Ibrahim v RHB Bank Bhd & Anor* (refd); and *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad* (refd)). (paras 81, 82, 84, 86 & 87).
>
> (2) The SAC did not have any characteristics of judicial power as laid down in the *Semenyih Jaya* case. The ruling made by the SAC was solely confined to the Shariah issue. *The presiding judge who made reference to the SAC would then exercise his judicial power and decide the case based on the evidence submitted before the court.* Since there was no judicial power vested in the SAC, the SAC did not usurp the judicial power of the court. Furthermore, s 56(1) of the 2009 Act gave an option to the court or arbitrator whether to take into consideration the published ruling of the

SAC or refer the Shariah issue to the SAC for ruling. The word 'or' in that section signified that such option was provided to the court or arbitrator. The phrase 'take into consideration' in that section implied that only the court or arbitrator had the exclusive judicial power to decide on the case by applying the ruling of the SAC to the facts of the case before them. (paras 108–109)

(3) It was axiomatic that the SAC did not finally dispose of the dispute between the parties. It did not engage in the judicial process of determining the rights of the parties. This was made clear in the Manual issued by Bank Negara called the Manual for References to Shariah Advisory Council by the Civil Court and Arbitrator, which principles had scrupulously been adhered to by the SAC in this case. Here, *the duty to ascertain Islamic law was conferred on the legislature and the SAC was the legislature's machinery to assist in resolving disputes in Islamic banking. It did not exercise judicial power at all*. Therefore, it was open to the legislature to establish the SAC as part of regulatory statute and to vest it with power to ascertain Islamic law for the purpose of banking. (paras 131, 132, 133 & 136)

(4) In the case of a reference made pursuant to s 56(1)(b) of the 2009 Act, parties involved were allowed to provide their own Shariah expert's views on the Shariah question(s). In the present application, the applicant had provided to SAC its own Shariah expert's view on the issue. (para 152)

(5) The use of expert evidence would not be helpful to a civil court judge as ultimately, the civil court judge would still have to make a decision. In the circumstances, it was for a body of eminent jurists, properly qualified in Islamic jurisprudence and/or Islamic finance, to be the ones dealing with questions of validity of a contract under Islamic law and in Malaysia that special body would be the SAC. (paras 157–158) (Emphasis added.)

[43] Upon considering the submissions, I note that the defendant has not cited any specific SAC ruling to substantiate the alleged mandatory requirement of sanction. Be that as it may, regarding the validity of entering into a restructuring agreement, I am satisfied that the method of variation through a supplementary agreement with the principal objective to grant more time is contractually sound. Furthermore, the following resolution passed at the 32nd meeting of the SAC, held on 27 February 2003 (as documented in *Shariah Resolutions in Islamic Finance* (2nd Ed) 2010, Bank Negara Malaysia), provides pertinent guidance:

Resolution

In the 32nd meeting dated 27 February 2003, the SAC has also resolved that based on mutual agreement, *the financing period for the customer may be extended without the need for a new contract, provided that both parties satisfy all concluded promises and the price imposed on the customer does not exceed the original sale price*.

[44] While there is no specific SAC ruling requiring a sanction before admission to the CDRC or the execution of a supplementary agreement to extend the repayment period, the resolution above clarifies that such extensions do not necessitate a new contract. The SAC has unequivocally affirmed that,

with mutual agreement, the financing period may be extended without the entry into a new contract, provided all agreed terms are upheld and the price does not exceed the original sale price.

[45] In my considered view, this resolution strongly supports the plaintiff's position that the restructuring of the financing facilities — primarily aimed at providing a moratorium period — complies with Shariah principles. A new contract is required only if it results in an increase in the original sale price. Even then, there is no requirement for a sanction in relation to the new contract. Accordingly, the defendant's allegation of a failure to obtain sanction is baseless and does not raise a triable issue.

Whether the banking facility contradicts Shariah principles

[46] The defendant's learned counsel contends that the banking facility contravenes Shariah principles, asserting that no actual *murabahah* transaction occurred. This, according to the defendant, renders the facility unlawful and void.

[47] In response, learned counsel for the plaintiff argues that the defendant's claim of Shariah non-compliance is baseless and amounts to a mere afterthought. The plaintiff maintains that the murabahah element of the facility is fully in accordance with Shariah principles.

[48] At the outset, I observe that no complaint has been lodged, nor any enforcement action undertaken by Bank Negara Malaysia against the plaintiff in respect of the alleged breach of Shariah principles. It is noteworthy that the defendant's objection appears to have emerged solely in response to the plaintiff's commencement of legal proceedings against them.

[49] I am of the view that in order to rebut the allegations of non-compliance of Shariah principles, the plaintiff simply has to provide proof of the commodity transaction by producing the necessary e-certificates issued by Commodity Murabahah House ('CMH') of Bursa Malaysia. This is because the relevant ruling as to such commodity is as per the ruling of the Shariah Advisory Council ('SAC') issued during its 78th Meeting held on 30 July 2008 (see: *Shariah Resolutions in Islamic Finance* (2nd Ed) 2010, Bank Negara Malaysia) states as follows:

> Resolution
>
> The SAC in its 78th meeting dated 30 July 2008, has resolved that the proposed operational structure of Commodity Murabahah House (CMH) is permissible on the condition that the traded Crude Palm Oil (CPO) *shall be identifiable and precisely determinable (mu`ayyan bi al-zat) in terms of its location, quantity and quality in order to meet the features of a real transaction*. In addition, it is also

recommended that the transaction shall be executed randomly so that the CMH operation is able to better meet the original features of *tawarruq*.

[50] It is therefore pertinent for the plaintiff to comply with cll 13.6, 13.7, 13.8, 13.9, 13.11, 13.13, and 13.14 of *Bank Negara Malaysia's Policy on Murabahah-based financing*, published on 23 December 2013 (Ref BNM/RH/STD 028–4) which provides as follows:

> 13.6 The transfer of ownership is effected upon entering into a valid sale and purchase contract even though there is no legal registration of the ownership, provided that the sale and purchase is supported by *evidence of transaction*.
>
> 13.7 The transfer of ownership shall take effect by the *seller disposing of the right of ownership* (*takhliyah*) resulting in the purchaser having *access to the asset* (*tamkin*) and assuming its risk through any mechanism permitted by the Shariah and generally accepted by customary business practices ('*urf tijari*).
>
> 13.8 Possession of the asset shall either be in the form of *physical possession* (*qabd haqiqi*) or *constructive possession* (*qabd hukmi*).
>
> 13.9 Pursuant to paragraph 13.8, the *rights and liabilities of the purchaser as the owner of the asset shall be established upon his possession* of the asset.
>
> 13.11 Multiple murabahah contracts shall not be entered into simultaneously on the same asset.
>
> 13.13 *Any defect in the asset which is discovered and consented to by the purchaser at the time of entering into the contract shall disqualify the purchaser from entitlement to the defect option (khiyar al-`ayb) with respect to the defect*.
>
> 13.14 *Any defect in the asset which occurred before entering into the contract but is discovered after entering into the contract shall entitle the purchaser to the defect option (khiyar al-`ayb)*. (Emphasis added.)

[51] Looking at the affidavit evidence, I find that the plaintiff did not exhibit the relevant e-certificates. As the plaintiff in this case has failed to provide such proof, I find that the defendant is entitled to raise this point to substantiate their allegation of a possible non-compliance with Shariah principles.

[52] Be that as it may, although it is possible that the said banking facility not being Shariah-compliant, it is trite that a breach of Shariah principles or SAC rulings alone would only affect the validity of the contract if it also violates applicable finance and banking laws. This is because laws relating to finance and banking matters are included under item 7(j) of the Federal List (List I) in the Ninth Schedule to the Federal Constitution, which is to be governed by statute law and common law (including English law).

[53] According to the article titled 'Impacts of the Islamic Financial Services Act 2013 on Investment Account products offered by Islamic Banks in Malaysia', published in the *International Journal of Management and Applied*

Research (Vol 6) No 4, pp 317–327 (written by Budiman, IK; Abdulaziz, M; Jaffar, A and Lo, MT (2019)), prior to the Islamic Financial Services Act 2013 ('the IFSA 2013') there was no clear guidance on managing Shariah non-compliance risk. It is observed by the writers that upon the enactment of the IFSA 2013, remedial measures are suggested.

[54] One of the remedial measures which is aimed at addressing breaches or contravention of in the IFSA 2013 can be found in s 281 wherein it states as follows:

> 281 Breach or contravention not to affect contract, agreement or arrangement
>
> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:
>
> Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[55] In *Citranet Sdn Bhd v Kuwait Finance House (M) Bhd* [2016] 12 MLJ 397 (HC), Azizah Nawawi J (as Her Ladyship then was) held that the non-disclosure of the exit fee in the redemption letter which is a breach of Bank Negara's guidelines on product transparency and disclosure issued under s 135 of the IFSA 2013 was a non-issue as s 281 of the IFSA 2013 clearly provides that any contract entered, which is in breach of the IFSA shall not be void by reason of such breach.

[56] As the provision pertaining to financial institution's duty to comply with Shariah principle and the rulings of SAC is within s 28 of the IFSA 2013, it follows that based on s 281 of the IFSA 2013, the non-compliance of such section does not render the banking facility or any instrument thereunder void.

[57] This is supported by the academic analysis of Mohd Johan Lee in his book titled *Islamic Banking in Malaysia*, Lexis Nexis (2017), where he posits that s 281 of the IFSA 2013 preserves the validity and enforceability of a contract even though it is non-Shariah compliant.

[58] Similarly, in the case of *Bank Kerjasama Rakyat Berhad (M) v Koperasi Serbaguna Iman Malaysia Berhad* [2020] MLJU 438; [2020] MLRHU 331 (HC), Atan Mustaffa Yussof Ahmad JC (as His Lordship then was) found that by virtue of s 281 of the IFSA 2013 any failure to adhere to Shariah principles does not result in the contract being void, invalid, or unenforceable.

[59] Post-2013, allegations of non-compliance with Shariah principles appear to be a matter between Bank Negara Malaysia and the individual financial institutions, potentially arising from a customer complaint. If a financial institution or its officers fail to adhere to the required Shariah principles, they may face criminal sanctions under s 28(5) of the IFSA 2013. However, under s 281, non-compliance with Shariah principles alone does not invalidate an agreement between the parties. Therefore, an agreement that contravenes SAC rulings is not necessarily void unless it also violates provisions of the Contracts Act 1950. This may include considerations such as whether the reasons for Shariah non-compliance involve factors that could render the contract void due to illegality (s 24) or uncertainty (s 30).

[60] If we are to examine the underlying concept, commodity *murabahah* involves purchasing specific commodities at an agreed-upon cost plus profit between the buyer and seller. The commodity is then sold to a third-party trader, with the primary objective of generating cash. Therefore, the main objective of this transaction is to raise cash, which is eventually disbursed to the borrower. In this case, since the cash was indeed raised and made available to the defendant, the method of raising such cash — even if it allegedly did not fully comply with Shariah principles — does not undermine the validity of the contract. Essentially, under laws relating to finance and banking matters, the method by which a bank procures funds for its customers does not affect the legal validity of a facility agreement.

[61] Based on the facts of the current case, I am in agreement with the principles applied in the Court of Appeal's decision in *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69 (CA), *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686 (CA), and *Maybank Islamic Berhad v Golden Base Construction Sdn Bhd & 2 Ors* (W-02(IM)(MUA)-1035–06 of 2019) (unreported) (CA). In *Maybank Islamic Berhad v Golden Base Construction Sdn Bhd & 2 Ors* the Court of Appeal have held that applying s 281 of the IFSA 2013 a breach of Shariah principle alone does not render the existence of a triable issue in a summary judgment application. This court is therefore bound by these decisions in that non-compliance of Shariah principles or SAC rulings alone would not amount to a triable issue.

Whether the charges levied on the defendant are excessive and beyond the terms of the contract

[62] On this issue, the defendant's learned counsel submits that the rates imposed by the plaintiff under the facilities are inconsistent. Focusing on the profit charges of 12% which comes up to a figure of USD271,200 per annum, the defendant argues that such amount has ballooned up to the figure of

USD400,000 by taking into account of *ta'widh* and other charges. In essence, the learned counsel for the defendant argues that the *ta'widh* rates and other charges imposed by the plaintiff beyond the 12% profit charges are without basis, exploitative, and against the Islamic principles.

[63] The case of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* is cited, in particular at paras [54]–[56], in order to assert that Islamic banking facilities, require the plaintiff bank to comply with Shariah principles and rulings.

[64] The plaintiff asserts that the defendants' arguments amount to nothing more than bare denials. It is argued that the defendants have failed to produce any credible evidence or contemporaneous documentation to substantiate their claims of excessive charges exceeding the agreed terms. The plaintiff emphasises that the defendants have not offered specific details to demonstrate how the imposed rates were excessive or erroneous, rendering their allegations insufficient to establish any triable issues.

[65] In substantiating their claim, the plaintiff highlights that the rates imposed are in accordance with the agreed terms of the financing documents, which the defendant duly accepted. Furthermore, the plaintiff has provided a certificate of indebtedness, which stands as final and conclusive evidence of the amounts owed by the defendant, as the defendant failed to produce any evidence indicating errors in this certificate.

[66] In my view, the agreements are unequivocal with respect to the charges to be imposed. Clause 11.4 of the facility agreements authorises the plaintiff to debit the defendant's account with any notice in respect of any cost, expenses, charges and payment due. Such charges include, but not limited to insurance paid, quit rent and assessment, fee, price value and/or revenue in a taxable supply to which GST would apply.

[67] Whilst cl 18.26 of the facility agreements clearly entitles the plaintiff to *ta'widh* at the rate of 1% on overdue amounts during the tenure of the facilities, and a further *ta'widh* not exceeding the daily weighted average overnight rate for *mudharabah* interbank investments quoted in Malaysia's Islamic interbank money market ('IIMM-rate') on the outstanding financing amount after the expiry of the financing tenure.

[68] In *Public Bank Berhad v Fu Poh Trading Sdn Bhd & Others* [2004] MLJU 133 (HC), the court dismissed the defendants' contention that the interest charged was excessive, given that they had expressly agreed to terms allowing for such variations. The court held that merely asserting errors in

calculation, without providing specific details, was insufficient to challenge the certificate of indebtedness.

[69] Similarly, I find that the plaintiff is entitled to rely on the *ta'widh* stipulated within the facilities. In applying the principles laid down in *HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors* [2005] 6 MLJ 625 (HC), the plaintiff is well within its rights to impose the charges as per the agreement entered into by the parties.

[70] In any event, I am of the considered view that the defendant had ample opportunity to review the terms of the agreements or to seek independent legal or Shariah advice, yet chose to raise no objections until the initiation of this suit. It is wholly untenable for the defendant, having fully utilised the financing, derived substantial benefits therefrom, and further enjoyed the restructuring arrangement facilitated by the CDRC, to now challenge the validity of the very agreements that granted them these advantages.

Whether the plaintiff's certificate of indebtedness is conclusive and unchallenged

[71] On the issue of correctness of the amount claimed, the defendant simply argues that the amount is uncertain as the particulars of its computation was not given to the defendants. In particular, the certificate of indebtedness was not given to them. The defendants rely on the case of *Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and another appeal* [2021] 3 MLJ 408; [2021] 3 CLJ 34 (CA) to argue that a bank cannot impose IIMM rate or the BNM pro-rated IIMM rate when contractually, *ta'widh* had been fixed at 1%pa and no written notice had been given to the borrower of its increase.

[72] The plaintiff on the other hand argues for the application of conclusive evidence clause within the facilities and guarantees entered between parties. Proof of quantum has been agreed to be based on a certificate of indebtedness as at 6 November 2023 (see exh LCH4 at PDF p 515, encl 14), which in absence of manifest error would be deemed conclusive evidence of the amount stated to be due.

[73] On this issue of quantum, I find that the facility agreements contain conclusive evidence clause. This can be seen in cll 18.1 and 18.2 which respectively states the following:

> 18.1 Evidence of indebtedness
>
> In any proceeding relating to this Agreement, a statement as to any amount due to the Bank under this Agreement which is certified as being correct by an officer of the Bank shall, unless otherwise provided in this Agreement, save for manifest error, be conclusive evidence that such amount is in fact due and payable.

18.2 Certificate conclusive

A certificate by the Bank as to any sum payable to it under this Agreement and any other certificate, determination, notification or opinion of the Bank provided for in this Agreement shall, in the absence of manifest error, be final and binding on the parties hereto or a statement of account in writing stating the amount payable by the Customer or any Security Party under this Agreement or under the CMTF-i duly certified by the Manager or any officer of the Bank or computer generated notices issued by the Bank which do not require signatures for whatever purpose, shall in the absence of manifest error, be binding and conclusive evidence against the Customer and/or such Security Party as being conclusive evidence of such indebtedness in a court of law.

[74] Conclusive evidence clauses operate to establish that a determination of the amount owed by a debtor is, for all intents and purposes, final and binding as to the sum payable. Such provisions effectively preclude the need for protracted inquiries into the precise calculation of outstanding debts, sparing the parties the necessity of combing through financial records in search of potential discrepancies.

[75] In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) at p 284, the Federal Court held that the indebtedness of the borrower may be ascertained conclusively by such certificate:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives'. *It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate*: see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co v Banque Vernes* [1973] 2 LLLR 437.
>
> *In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for*. (Emphasis added.)

[76] Lord Denning MR in *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris* [1973] 2 Lloyd's Rep 437 (CA) had this to say at p 440:

> [t]hat, as a matter of principle, the conclusive evidence clause was binding according to its terms and, if notice of default was given in pursuance of the conclusive evidence clause it was binding according to its terms, the clause was not contrary to public policy.

[77] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as*

KH Trading) & Anor through the judgment of Steve Shim CJ (Sabah and Sarawak) quoted with approval of the case of *Dobbs v National Bank of Australasia Ltd* [1953] 53 CLR 643 (HC), where the High Court of Australia made the following observation:

> ... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[78] Steve Shim CJ (Sabah and Sarawak) in *Cempaka Finance Bhd* case also held that 'a certificate of indebtedness operates in the field of adjective law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disapprove the amount claimed' (at para 11).

[79] The reference to 'manifest error' nevertheless would allow a comeback if there is a material mistake in the calculations. In the case of *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 (CA), the English Court of Appeal held as follows:

> 83. Is this a case of manifest error? There are two helpful recent authorities on this issue, namely *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542; [2008] 2 All ER (Comm) 1173 and *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230; [2012] Ch 31.
>
> 84. IIG was a claim for payment against guarantors. The defendants had bound themselves to pay on demand, absent manifest error. Lewison J, the trial judge, rejected the suggestion that there was manifest error. He said that a manifest error was '*one that is obvious or easily demonstrable without extensive investigation*'. The Court of Appeal approved the judge's approach to that issue and upheld his decision: see the judgment of Waller LJ at [33] to [35]. Lawrence Collins and Rimer LJJ agreed.
>
> 85. North Shore was an action by a lender against the two guarantors of the loan. Clause 3.4 of the guarantee stated that a certificate signed by the claimant for the amount of the indebtedness was conclusive evidence against the guarantors, unless manifestly incorrect. The Court of Appeal approved the test for manifest error formulated by Lewison J in IIG. The court held that the certificate was invalidated by manifest error, because it did not take into account an agreed variation in the rate of interest.
>
> 86. At [61] Smith LJ said:
>
> > On reflection I have come to the conclusion that for a party to rely on a manifest error in a certificate does not depend upon his ability to demonstrate the error immediately and conclusively. *In the present case, the guarantors were able to recognise immediately that the certificate was based upon the interest rates as set out*

in the original loan agreement and not as varied in November 2004. They could see that it was manifestly incorrect. They could not immediately demonstrate that conclusively; they could not do so until the court had determined the issue of variation. But they were right, as this court has now held. I would hold that the certificate was manifestly incorrect and was of no effect.

87. Finally, in relation to the law, I should refer to *IG Index v Colley* [2013] EWHC 748 (QB). In a very thorough judgment Stadlen J reviewed the authorities on manifest error. At [813] to [814] he held that *the court could have regard to extrinsic evidence*.

[80] This principle is reaffirmed in the recent judgment of *Flowgroup plc (in liquidation) v Co-Operative Energy Ltd* [2021] EWHC 344 (Comm) (QBD), wherein the English High Court held that for a challenge based on a manifest error clause to succeed, there must be a plain and obvious mistake. However, whether such an error has indeed occurred is a matter of fact, and need not be glaringly apparent from the face of the certificates themselves. In the *Flowgroup* case, the error in issuing the certificates only came to light once the underlying contractual obligation was properly scrutinised.

[81] Applying these authorities, in determining whether a manifest error exists, one must consider that some errors only reveal themselves once the court has arrived at a particular legal conclusion. While it may not be possible to demonstrate 'immediately and conclusively' that the errors were incorrect at first glance, they may nonetheless still constitute manifest errors.

[82] At all material times, the defendant did not raise any objections to the quantification of amount due. Their assertion of excessive charges only surfaced with the initiation of this suit. Be that as it may, and in light of the authorities cited above, it would be premature to dismiss such objections as mendacious. The law entitles the defendants to scrutinise the certificate thoroughly, ensuring not only there is no glaring mistakes but that the charges aligns with the terms and conditions set forth in the facility agreements.

[83] From the affidavit evidence presented, I am of the considered view that the defendant has failed to identify any glaring, plain, or obvious error in the certificate. The sole issue for this court's consideration with regards to the calculation of the outstanding sum is whether the rates imposed warrant scrutiny on the basis of being allegedly excessive. As established earlier in this judgment, cl 18.26 of the facility agreements governs *ta'widh*, which were agreed upon by the parties. These rates stipulate a 1% charge prior to maturity and the imposition of a different rate based on IIMM-rate upon maturity.

[84] Furthermore, the debiting of the defendant's accounts with the IIMM rate upon maturity is governed by cl 18.26(a)(ii) of the facility agreements, which imposes no obligation on the plaintiff to inform the defendant of the actual IIMM rate. For clarity, cl 18.26 is reproduced below:

> 18.26 Compensation Fee (ta'widh)
>
> (a) The Customer shall be liable to pay the Bank compensation a follows:
>
> i) for failure to make any payment due under CMTF-i from the date of the first disbursement until the date of maturity of the CMTF-i, the compensation rate that shall be applied is 1% per annum on the overdue installment amount or any other method approved by Bank Negara Malaysia (BNM) or the Association of Islamic Banking Institutions of Malaysia (AIBIM);
>
> ii) *for failure to pay any amount overdue and which failure continues beyond the maturity date of the CMTF-i, the compensation rate that shall be applied is the Bank's prevailing Islamic Interbank Money Market Rate on the balance of the overdue amount or any other method approved by BNM*;
>
> (b) the amount of such compensation shall not be compounded on the Facility Amount.
>
> (c) the compensation at the aforesaid rate shall be payable by the Customer after as well as before any judgment or order of court. (Emphasis added.)

[85] In my considered view, the wording of the clause makes it unequivocally clear that the plaintiff is under no obligation to inform the defendant of the specific IIMM-rate applied. The reference to the 'IIMM-rate' as the *ta'widh* imposed post-maturity is a practical measure that promotes business efficacy, particularly in light of the daily fluctuations in the IIMM rates. Requiring the plaintiff to notify its customers of each adjustment in real time would be impractical. Moreover, I do not find the clause unreasonable, as the IIMM-rates, representing the weighted average overnight profit rates for Islamic interbank placements, are publicly available and updated daily by Bank Negara Malaysia. Notably, the certificate of indebtedness indicates that the monthly *ta'widh* imposed on the defendant is not compounded on the facility amount, further affirming the fairness and compliance of the plaintiff's actions with the agreed terms.

[86] From January 2021–December 2023, the published IIMM-rates ranged between 1.68% and 3.07%. While the *ta'widh* imposed post-maturity, compared to the 1% rate applied pre-maturity, may appear 'excessive,' it is important to note that there is no requirement for the plaintiff to notify the defendant of these variations. The certificate of indebtedness, reflecting IIMM rates ranging from 1.72% to 3.05%, remains unchallenged and is deemed conclusive. Accordingly, I find that this issue does not give rise to a triable matter.

DECISION

[87] Based on the aforementioned grounds, this court have granted order in terms of the plaintiff's application for summary judgment in encl 12 with costs of RM7,000.

Order in terms of plaintiff's application for summary judgment in encl 12 granted with costs of RM7,000.

Reported by Dzulqarnain Ab Fatar